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Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 17, 1899.

No. 182.

GEORGE L. WHITMAN,
Petitioner,

vs.

THE NATIONAL BANK OF OXFORD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

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SUPREME COURT OF THE UNITED STATES,

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GEORGE L. WHITMAN, Petitioner,

vs.

THE NATIONAL BANK OF OXFORD.

BRIEF FOR PETITIONER.

This is a writ of *certiorari*, issued by this Court, October 26, 1897, to remove into this Court the record and proceedings in a certain cause in the Circuit Court of Appeals for the Second Circuit, wherein George L. Whitman was plaintiff in error, and The National Bank of Oxford was defendant in error.

The original action was brought in the Circuit Court of the United States for the Southern District of New York, by the National Bank of Oxford against George L. Whitman, and in that action the plaintiff recovered judgment against the defendant upon a trial before the Hon. HOYT H. WHEELER and a jury. The judgment was affirmed by the Circuit Court of Appeals, the decision having been handed down July 21, 1897.

Statement.

This action was begun May 29, 1895 (3).

The cause of action was set forth in the complaint as follows (6–14) :

The plaintiff was and is a national banking association, incorporated and doing business in the State of Pennsylvania and a

citizen of that State. That defendant was and is a citizen of the State of New York and a resident of the Southern District of New York. That the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs.

That the defendant is a stockholder in the Arkansas City Investment Company, a corporation of the State of Kansas, holding fifty thousand dollars of its stock. The plaintiff is a creditor of the Arkansas City Investment Company upon the guarantee by that company of two promissory notes made by certain individuals, and maturing respectively on February 7th and March 4th, 1891. That after the creation of these obligations the Arkansas City Investment Company was duly dissolved, and completely suspended its business, and has ever since failed to resume; which dissolution and suspension occurred more than twelve months prior to the bringing of an action by plaintiff against said company in a District Court of the State of Kansas, upon said guarantee. That in said action on April 16, 1895, plaintiff recovered judgment for the amount of said obligations with interest and costs, amounting altogether to $3468.30.

That the constitution and statutes of the State of Kansas contain the following provisions:—

Constitution, Article XII, Section 2: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

General Statutes, 1868, Chapter 23, Section 32: "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Same, Section 40, as amended in 1883: "A corporation is dissolved: first, by the expiration of the time limited in its charter, second, by a judgment of dissolution rendered by a court

of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

Same, Section 44: "If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

That execution was issued upon said Kansas judgment out of the Kansas court, against the Arkansas City Investment Company, and returned wholly unsatisfied. That said company is wholly insolvent. And that defendant "has not met any part of his liability as a stockholder under the statutes hereinbefore mentioned."

The complaint demands judgment against the defendant for the amount of plaintiff's Kansas judgment against the Arkansas City Investment Company, together with ten per cent. interest upon the amount of the Kansas judgment, and costs.

Upon the trial the plaintiff proved the incorporation of a Kansas corporation named the Arkansas City Bank, by certificate dated September 2, 1886, and its organization on December 4, 1886, of which bank the defendant was one of the incorporators and was a stockholder to the extent of 1000 shares, representing $100,000 of the capital stock (16-19); and one James L. Huey was examined as

a witness on behalf of plaintiff by deposition taken in Kansas. Huey testified that he was the cashier of the corporation from the time of its organization until December, 1890, (20). An attempt was made to prove that the name of the corporation was in the meantime changed to the Arkansas City Investment Company. Huey testified that a record was kept of the proceedings of the corporation, but that he was unable to find such record (21) and that it was his recollection that such record or minutes were taken possession of by Mr. Newell, the president (24). Without further proof of loss or inability to produce such record, Huey was permitted, under objection and exception, to testify that a meeting of the stockholders and directors was held and that " we relinquished the name of the Arkansas City Bank and selected the name of the Arkansas City Investment Company, and under that name proceeded to do business from that time on " (24). Also under objection and exception, an affidavit of Huey on file in the office of the Secretary of State, of Kansas, to the effect that " on the 25th day of May, A. D. 1889, the stockholders unanimously voted to adopt the name ' The Arkansas City Investment Company,' " was received in evidence (25).

Huey further identified two promissory notes ; one (29) made by Silas Kennedy, to the order of " J. L. Huey, cash.," for $2825.00, dated September 1, 1890, due March 4, 1891, payable at the office of the Arkansas City Investment Company ; the other (31) made by J. D. Harkleroad and E. C. Harkleroad, to the order of " J. L. Huey, cash.," for $2050.00, dated August 4, 1890, due February 7, 1891, payable at the office of the Arkansas City Investment Company.

Each of these notes bore the following endorsement :

" For value received I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand and notice of demand, and non-payment and suit against the maker, and consent that the payment of this note may be extended from time to time, without affecting my liability thereon. Arkansas City Investment Co., Arkansas City, Kansas. J. L. Huey, Cash." (50-51.) Huey testified that he placed this endorsement upon each note.

On December 15, 1890, the Arkansas City Investment Company made a general assignment for the benefit of its creditors to Charles A. Scruton (26-27) and Huey testifies that the assets of the Company were then turned over to Scruton, who took charge of, and

collected them, and attended to the business of assignee until November, 1894, when Huey became assignee in place of Scruton.

Plaintiffs action in Kansas was begun by voluntary appearance given by Huey on its behalf (37) in the following terms (49):

"Comes now the said defendant, The Arkansas City Investment Company, and enters its appearance herein and waives the issuance of process and service of summons upon it, and submits to the jurisdiction of this court in this cause for all the purposes of this suit. The said defendant, however, reserves the right to answer or plead herein on or before the 14th day of January, A. D. 1895.

"THE ARKANSAS CITY INVESTMENT COMPANY,

"By J. L. HUEY, Cashier and Managing Officer."

The alleged judgment was entered in the District Court of Kansas, for Cowley County, April 16, 1895 (36), by default "the said plaintiff appearing by its attorneys, Troup & Brown, and the defendant appearing not." It purports to find "that the said defendant, The Arkansas City Investment Company is indebted to the plaintiff, The National Bank of Oxford, Pennsylvania, upon the promissory notes mentioned and set forth in the plaintiff's petition and sued on in this action in the sum of $3,449, with interest from this date, at the rate of ten per cent. per annum," which amount together with $19.30 costs it adjudges that plaintiff recover of defendant (37).

Execution on this judgment was issued to the Sheriff of Cowley County, and returned wholly unsatisfied (38).

J. L. Huey was discharged as assignee of the Arkansas City Investment Company, by an order of the same District Court, June 2, 1896, Troup & Brown appearing as his attorneys (32-33).

At the close of the trial the court directed a verdict in favor of the plaintiff for $3,468.30, being the amount of the Kansas judgment above stated, viz. $3,449 damages and $19.30 costs (40), and being the same amount for which judgment was demanded in the complaint (8).

The defendant entered a motion to set aside the verdict which was denied (12-13) and judgment entered (14).

On writ of error to the Circuit Court of Appeals the judgment was affirmed. The following is the specification of errors assigned:—

Specification of Errors.

FIRST.—That said Judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows (40):

Q. You may now state what was done by the stockholders and officers of the Arkansas City Bank, with reference to the cessation of business as a bank, and the furtherance of other business?

Question objected to by defendant's counsel as irrelevant and calling for secondary evidence, and on the further ground that no proper foundation has been laid for the introduction of such secondary evidence, and that the answer is intended to cover the ground that there was a proper form of action on the part of the stockholders to justify the change of name. Objection overruled. Exception by defendant.

A. Well, in May or June, 1889, after we had quit doing a general banking business, we had a chance to dispose of certain supplies and fixtures to other parties who wanted to engage in the bank business, and wanted to have the use of the name of the Arkansas City Bank. Mr. Newell was here at that time, and we had a meeting of the stockholders and directors, and we relinquished the name of the Arkansas City Bank and selected the name of the Arkansas City Investment Company, and under that name proceeded to do business from that time on.

Defendant moves to strike out the answer of the witness as not being responsive to the question, and as giving oral testimony as to the proceedings of the directors and stockholders of the Arkansas City Bank, without having laid the proper foundation for the introduction of secondary evidence as to such proceedings. Motion denied. Defendant excepts.

SECOND.—That said Judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows (41):

Q. Was a copy of these proceedings made and furnished to the Secretary of State of the State of Kansas at that time?

Objected to by defendant's counsel as immaterial and not calling for the best evidence. Objection overruled. Exception by defendant.

A. There was.

THIRD.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (41):

Plaintiff's counsel offered in evidence a duly certified copy from the office of the Secretary of State of the State of Kansas of the proceedings of the stockholders of the Arkansas City Bank, for the changing of its name certified by the secretary of the company and attested by the Secretary of State of Kansas.

By Defendant's Counsel: "I do not object on the ground that the copy is not properly authenticated as a copy of whatever original paper is on file, but I object on the ground that the evidence is not supported by evidence of action on the part of the stockholders; and, furthermore, that it is not in compliance with the requirements of the laws of Kansas."

Objection overruled. Defendant excepts.

Paper admitted in evidence and marked Plaintiff's Exhibit 3.

Fourth.—That said Judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows (47):

Q. What was done with the paper after it was signed by Mr. Kennedy?

Objected to by defendant's counsel as immaterial, because the action is founded upon a judgment of the District Court of Kansas against the Arkansas City Investment Company, and the theory of the complaint is that this defendant, as a stockholder of that company, is liable to be charged with the amount of that judgment. That does not call for the proof of the original indebtedness. The question is whether this judgment is a liability on the part of this stockholder.

Objection overruled. Exception by defendant.

A. It was discounted to the National Bank of Oxford, Pennsylvania.

Fifth.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (48):

Plaintiff's counsel offers in evidence note dated September 1, 1890, for $2,825, payable to the order of J. L. Huey, signed Silas Kennedy. Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked Plaintiff's Exhibit 5.

Sixth.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (50):

Plaintiff's counsel offers in evidence note dated August 4, 1890, for $2,050, payable to the order of J. L. Huey, cashier, signed by J. D. Harkleroad and E. C. Harkleroad.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked Plaintiff's Exhibit 6.

SEVENTH.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (53) :

Plaintiff's counsel offered in evidence an order of the Kansas Court, discharging the assignee of the Arkansas City Investment Company.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Order admitted in evidence, marked Plaintiff's Exhibit 7.

EIGHTH.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (59) :

Plaintiff's counsel then offered in evidence certified paper purporting to be a judgment of the District Court of Cowley County, Kansas, in favor of this plaintiff and against the Arkansas City Investment Company.

DEFENDANT'S COUNSEL : " I raise no question in regard to the authentication of the copy which is offered, but I do object to the judgment itself as not a judgment against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action."

Objection overruled. Exception by defendant.

Judgment admitted in evidence and marked Plaintiff's Exhibit 8.

NINTH.—That said Judge on said trial admitted in evidence a certain paper or document, as follows (61) :

Plaintiff's counsel offers in evidence an execution issued under the said judgment against the Arkansas City Investment Company to the Sheriff of Cowley County, Kansas, and return of the same unsatisfied.

Defendant's counsel objects to the same as not against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever and no evidence for the purpose of establishing any

liability on the part of the defendant in this action. Objection overruled. Exception by defendant.

Execution admitted in evidence.

TENTH.—That said Judge on said trial refused to direct a verdict for the defendant, and directed a verdict for the plaintiff as follows (64–65):

Plaintiff's counsel moves the Court to direct a verdict for the plaintiff. Defendant's counsel moves the Court to direct a verdict for the defendant upon the following grounds:

That the action must be sustained, if at all, upon the provisions of the Kansas statutes, as the provisions of the constitution of Kansas are not self-executing, and have no force excepting in so far as they have been given effect by statutory enactments. That the action is founded upon a judgment of a Kansas Court against a Kansas corporation, and that such judgment can be enforced against a stockholder of such corporation only by virtue of the Kansas statutes, and only within the territorial limits of the State of Kansas and elsewhere, is no judgment against the stockholder, and is *res inter alios*. That the remedy provided by the Kansas statutes has no extra-territorial force outside the limits of the State of Kansas, but is a statutory proceeding to enforce a Kansas judgment against a Kansas corporation as a personal liability of a stockholder in the corporation who is not a party to the judgment or to the action in which the judgment has been recovered. That the liability imposed upon stockholders by the Kansas statutes is not a general liability, as upon a contract, for the debts of a corporation, but a special, limited and contingent liability, coupled with a special and peculiar remedy created by the same statute and not known to the common law; that whatever obligations or liabilities imposed by such statutes the defendant accepted by accepting the stock of the Kansas corporation, were to the same extent accepted subject to their being enforced only in the manner provided in the same statutes, and with the full benefit to the defendant of all the protections and safeguards afforded by the same statutes; and that it was neither practicable that such protection and safeguards shall be afforded to the defendant in proceedings brought in other States than Kansas, nor competent for the State of Kansas or its Legislature to prescribe new forms of procedure for the courts of other States or of the United States beyond the limits of Kansas. That the remedies which can be enforced in this action are those afforded by the *lex fori*, and the *lex fori* is the law as administered in the

State of New York, the jurisdiction of this Court and that of the courts of New York State being concurrent, and the procedure being the same in both in actions at common law; and that this action could not be maintained in the courts of New York State. That the alleged jurisdiction of the Kansas Court to award the judgment upon which this action is founded rests upon the voluntary appearance of the Kansas corporation, and such appearance being entered by the former cashier of that corporation over two years after its dissolution, was unauthorized and ineffectual to confer any jurisdiction upon the Kansas Court. That this Court has no jurisdiction over the subject of the action, and no jurisdiction to enforce a statutory remedy of the State of Kansas. That no cause of action is alleged in the complaint; and that no cause of action has been proved upon the trial.

The Court denied defendant's motion and said: "You may take a verdict for the plaintiff and you may enter a motion to set aside the verdict. I will look at this case, and if I think it ought to be set aside I will rule upon that question then. All further proceedings to be stayed until the determination of that motion."

Defendant's counsel excepts to the denial of defendant's motion for the direction of a verdict for defendant and to the ruling of the Court directing a verdict for the plaintiff.

ELEVENTH.—That the jury upon said trial under the direction of the said Judge rendered a verdict for the plaintiff, and such verdict was contrary to the evidence in the case.

TWELFTH.—That the jury upon said trial under the direction of the said Judge rendered a verdict for the plaintiff, and such verdict was contrary to law (65).

THIRTEENTH.—That the said Judge upon the conclusion of said trial refused to set aside the said verdict and directed judgment thereon as follows:

> Thereafter the Court denied defendant's motion to set aside the verdict and directed the entry of judgment thereon, to which denial and direction the defendant excepted (66).

Argument.

The principal question presented here is that of the personal liability of the defendant as a stockholder in the Kansas corporation for the *judgment* claimed to have been recovered in the Kansas court against that corporation.

The action here was not brought on the ground of an original liability of defendant for an original obligation of the corporation. It is brought for the exact amount of the Kansas judgment, with interest from the date of the Kansas judgment, and at the rate of interest fixed by the Kansas judgment. This is the prayer, or demand of the complaint (8). And this is the verdict actually rendered under the direction of the court (40), viz. for the sum of $3,468.30 the amount of the judgment entered in the Kansas court on April 16, 1895, in favor of the plaintiff and against the Arkansas City Investment Company, with interest from that date at the rate of ten per cent.—fixed by that judgment (37)—amounting together to $3,868.05. And for the amount of this verdict, with further interest from date at the same rate of ten per cent, the judgment (14-15) was entered, which is now before this Court for review.

The argument involves the discussion of the origin, nature and extent of any individual liability on the part of defendant for the debts and obligations of the Kansas corporation, the power of the Kansas legislature to create new remedies to be administered elsewhere than in Kansas, and the power and duty of courts elsewhere to entertain jurisdiction for the enforcement of such remedies.

POINT FIRST. Defendant's liability, if any, is purely statutory.

The liability is not imposed by the constitution of Kansas, because that is not self executing.

This precise point was determined by Justice CLIFFORD, in *Morley v. Thayer*, 3 Fed. 739. In that case the constitutional provision under discussion was embraced in the constitution of the state of Ohio, but was in the identical language cited above from the constitution of the state of Kansas. " Enough " said the court " appears in the constitutional provision itself to show that the view of the complainants that the article is self-enforcing cannot be sustained. It ordains that 'dues from corporations *shall be secured* by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder and by such other means as shall be provided by law.' Cases undoubtedly arise where

the provision of a constitution operates immediately, as when the object is to suppress an existing evil ; but when the provision points to something more to be done, and looks to some future time for the accomplishment of what is required, the general rule is that it contemplates legislation to carry it into effect. Power is plainly given to the legislature in this case to pass laws to render stockholders individually liable for the debts of the corporation, and it doubtless makes it their duty to do so ; but it by no means follows that the stockholder is made liable where there is no statute creating such liability or prescribing the means or mode of its enforcement. Beyond doubt it looks to legislation, nor does it contain a word to justify the conclusion that the framers of the provision supposed that they were completing the end in view, as no attempt is made to provide any other means for its accomplishment than legislation (*Groves v. Slaughter*, 15 Pet., 449, 500). Even if the rule would be otherwise, in case the legislature had failed to comply with the constitutional mandate, still it is clear that the statutes passed in fulfillment of that requirement constitute the unmistakable rule of decision and furnish the only basis of judicial action."

The same question was considered in *Barnes v. Wheaton*, 80 Hun, 8, by Judge MARTIN, then of the New York Supreme Court, now of the Court of Appeals. He says : "The provisions of the constitution of the state of Ohio set out in the complaint declare that, 'dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law ; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon to a further sum at least equal in amount to such stock." In *State of Ohio, etc., v. Sherman* (22 Ohio St., 411), it was held that the legislature of that state "had no power under the present constitution to create corporations without securing the individual liability of their stockholders, at least to the minimum amount required by the constitution ; and if the act of incorporation did not secure these either by expressed provision or by requiring from the corporators or stockholders such acts of organization or otherwise as would subject them to the constitutional provision, the act would be unconstitutional and void. In *French v. Teschemaker* (24 Cal., 518, 539), where a similar provision in the constitution of that State was under consideration, it was held that the provision was not self-executing, but required legislation to carry it into operation. The

cases of *Morley v. Thayer*, (3 Fed. Rep., 737), *Fusz v. Spaunhorst* (67 Mo., 256) and *Groves v. Slaughter* (15 Pet., 449) are to the same effect. It is obvious that this provision of the constitution of the State of Ohio is not self-executing, but that its purpose is to confer upon the legislature the power, and impose upon it the duty of securing dues from corporations by imposing upon the stockholders of such corporations as are organized under the laws of that State, an individual liability ", etc.

So likewise in *Marshall v. Sherman*, 148 N. Y., 9, it is said in regard to this very Kansas constitution: " We think it quite clear that the provision of the constitution referred to is not self executing, and of itself creates no liability whatever. The language used plainly contemplates that legislation was necessary in order to make it effectual. It was intended simply to confer authority upon the legislature of that State to legislate upon the subject, and perhaps it imposed upon that body the duty of securing the debts of corporations by imposing upon the stockholders an individual liability, and by such other means as in its discretion it should deem proper, always limiting such power and discretion by the provision that each stockholder should be made liable to an amount equal to the stock held by him. The legislature did enact such statutes, and it is these enactments, and not the constitution itself, which is sought to be enforced in this action."

Tuttle v. National Bank of the Republic, 161 Ill., 497, is to the same effect, and refers to this same Kansas constitution.

Upon this point the decision of the Circuit Court of Appeals in the present case is in harmony with the decisions which have been cited. It says,—

" It is to be premised, as was clearly shown by Justice CLIFFORD, in *Morley v. Thayer* (3 Fed. Rep. 739) with respect to this particular constitutional provision, that it is not self executing in its character, and that statutory legislation was therefore required to carry it into effect."

Obviously, then, whatever liability exists, exists solely by virtue of the statute. It is the creature of the statute. It is what the statute declares it to be; no more, no less. It has efficacy where the statute has force and effect *proprio vigore*. It differs in origin and in nature from an ordinary common law or contractual liability.

In *Wells v. Robb*, 43 Kan. 201, the Supreme Court of Kansas quoted with approval the language of the same court in *Henting v. James*, 22 Kan. 326, in reference to this very subject: " The lia-

bility arises solely by constitutional or statutory provision. As a consequence, the matter here *is wholly governed by the statute*, and the rights of the party claiming under the statute *must be ascertained by it*." This was said of the liability under section 32 of the Kansas statute.

Any argument, then, which our adversaries seek to draw from the language of the Kansas constitution, is unavailing. The liability of the stockholder here must be established solely upon the terms of the *statute*.

POINT SECOND. The Kansas statute does not create or impose a general liability, or a liability as upon contract.

It is noteworthy that the statute does not declare any personal liability of stockholders. It does not say, "Each stockholder shall be severally individually liable for the debts of the corporation to an amount equal to the amount of the stock owned and held by him." *That* was substantially what the New York statute said, and what every statute has said which has been heretofore construed as creating a general liability which follows the person into all jurisdictions. *That* was substantially what was said in the statute before the court in *Flash v. Conn*, 109 U. S. 371, the case mainly relied upon as supporting the conclusion of defendant's general liability, here. There the language was: "All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company."

And that was substantially what was said in the Kansas statute for the incorporation of insurance companies, known as section 14, chapter 31, of Kansas laws of 1863: "The stockholders of any company organized under this act, shall to the amount of stock by them held, be jointly and severally liable for all debts or responsibilities of the company." This was the language of the statute which was before the Kansas court in *Grund v. Tucker*, 5 Kan. 70, which decision, as is said in the opinion of the Circuit Court of Appeals (53) "anticipated the decision in *Flash v. Conn*."

But the Kansas statute which is under consideration in the present case will be searched in vain for any declaration of this kind. It nowhere contains any expression to the effect that stockholders shall be individually liable. What it does say is: "If any execution shall have been issued against the property or effects of a corporation * * * and there cannot be found any property whereon to levy such execution, *then execution may be issued* against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned * * * or the plaintiff in the execution *may proceed by action* to charge the stockholders with the amount of his judgment."

Thus the liability of a stockholder under this Kansas statute is only created by creating two special remedies against him; (1) an execution issued against him upon a judgment against his corporation, or, in the alternative, (2) an action against him by the "plaintiff in the execution" to "charge" him with the amount of such judgment.

Under this section 32 there is no liability for the corporation's contracts and liabilities generally, but only a liability to be compelled by execution or action to pay the amount of judgments which may be recovered against the corporation. It is not the original debt which the stockholders may be compelled to pay, but only the judgment. The statute of limitations runs in favor of the stockholder, not from the maturity of the original debt, but from the return of an unsatisfied execution against the corporation. This was distinctly held in *Bank of North America v. Rindge*, 57 Fed. 279.

These distinctions which we have pointed out go to the very root of the matter. The general liability declared by the statutes of New York and other states, above referred to, is a liability for the original debt of the corporation, and the original debt must be established against the stockholder. As was said in *Kincaid v. Dwinnelle*, 59 N. Y. 551, "The judgment against the corporation is of no virtue or effect in the action against the stockholder, and is *only* evidence as proving the performance of the condition precedent." But it is held in *Bail v. Reese*, 58 Kan. 614, that in a proceeding under the Kansas statute to enforce individual liability, the judgment against the corporation is *conclusive* upon stockholders, in the absence of collusion or fraud. "As the judgment was valid, the court committed error in allowing the defendants to go behind it and contest matters which were conclusively settled by the judgment against the corporation."

The difference is radical. In the one case we have a liability for the original debt; in the other a liability for a Kansas judgment against the corporation. The debt is the basis of the action to enforce the one; the Kansas judgment is the foundation, and the *only* foundation of the proceeding to enforce the other.

Moreover, the point already noted should be continually borne in mind, that while the New York statute, and other kindred statutes which have been held to create a general personal liability, contain an express declaration of such liability, this Kansas statute contains nothing of the sort.

In *Pollard v. Bailey*, 20 Wall. 520, it is said: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement." "The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, *that remedy, and that alone, must be employed.*"

To like effect is *Terry v. Little*, 101 U. S. 216: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The *first* thing to be determined in all such cases is, therefore, *what liability has been created.* There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen, unless *special attention* is given to the *precise language of the statute* under consideration."

Now the Kansas statute does not assume to create a general liability without a remedy, or a general liability with a remedy; it does not assume, in terms, to create any liability at all. It merely assumes to create a remedy, and the liability is nothing more than an inference from the remedy so created.

It necessarily results that no other liability exists than such as is clearly implied in the remedy created, and clearly enforceable by that remedy.

POINT THIRD. The remedy is not available without the State of Kansas.

It is hardly necessary to say that the remedy is one unknown to the common law. It is purely the creation of the Kansas statute. Thus we have presented the question of the power of the Kansas legislature, to create remedies, as distinct from liabilities, to be enforced beyond the boundaries of the state of Kansas.

The remedy is a proceeding to enforce the judgment which has been rendered against the Kansas corporation in the Kansas court. It designs to enforce this judgment by proceeding against the stockholder to collect it from him. It provides two alternatives.

The first is, an execution may be issued directly against the stockholder, upon the judgment against the corporation. Clearly this is confined to the territorial limits of Kansas.

The second is, an action by "the plaintiff in the execution" to charge the stockholder with the amount of the judgment against the corporation.

Now it is but fair to the Kansas legislature to say that nothing in the statute itself indicates any intention on its part that either form of the remedy was to be employed outside that state. Certainly such intention should not be imputed to it without strong evidence that it existed. Let us consider its precise terms and scope. It says:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion such court may order execution to issue accordingly; *or* the plaintiff in the execution *may proceed by action* to charge the stockholders with the amount of his judgment."

Here are two proceedings provided. One summary, one deliberate. The use of the summary proceeding is in the discretion of the court which has rendered the judgment against the corporation.

The use of the deliberate proceeding is vested as a right in "the plaintiff in the execution." The statute necessarily contemplated the use of the former in Kansas, only. It could never have assumed to legislate for the issuance of foreign executions out of foreign courts, or for the issuance of executions in foreign jurisdictions, against stockholders, and upon judgments against their corporations. Nor could it have assumed to confer upon foreign courts the discretion to entertain motions for the issue of such executions. Had the Kansas legislature attempted to do any such things its action would have been nugatory.

But the Kansas legislature clearly attempted nothing of the sort. No such intention being expressed, none can be presumed. If there were any question as to intent, it would be answered in favor of an intent to keep within its legitimate powers, *ut res magis valeat.* But no such question is possible here. The provisions are naturally and properly addressed to proceedings to be taken and remedies to be administered in the state of Kansas, in like manner as all other provisions of Kansas statutes relative to the legal proceedings and remedies.

This is unmistakeably and indisputably manifest in regard to the summary proceeding. So much, at least, *must* be conceded.

Such being the only construction which can properly be given to the provisions regarding the first proceeding, which comprise the whole of the section in question, with the exception of the last three lines, we may well ask what evidence those three lines afford of any intent to assume an entirely different attitude in regard to the second proceeding. Nothing in the language of those three lines demands any such construction. On the contrary, the ordinary rule for the construction of statutory provisions *in pari materia* and the natural meaning of the language used, in its connection with that which precedes, unite to indicate that the intent was the same in regard to both proceedings, so far as related to the jurisdiction within which they were to be taken.

The language of these lines is: "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The words "plaintiff in the execution" refer back to the execution mentioned in the earlier part of the same section, and indicate the two alternatives in the mind of the legislature; a motion in aid of the execution, and an action in aid of the execution.

It surely will not be held, without the faintest indication of such purpose, that the Kansas legislature assumed to confer upon the plaintiff in a Kansas execution the right to maintain an action in aid of that execution, in foreign jurisdictions. The Kansas legislature will be acquitted of undertaking to transcend its powers, or of assuming to exercise powers of extremely doubtful validity, when there is nothing in the language of the statute or in the circumstances under which it was passed to indicate any such intention, and when its reasonable and natural interpretation avoids wholly such accusation.

To this we might reasonably add that if the Kansas legislature designed to accomplish the result which our adversaries claim has been brought about by the enactment of these few lines, it never would have resorted to so clumsy and dubious an expedient to that end. Individual liability of stockholders for corporate debts was no new thing. It existed in many states. It was referred to in the Kansas constitution. It already existed in Kansas under the statute considered in *Grund v. Tucker*, 5 Kan. 70, which provided that the "stockholders of any company organized under this act, shall to the amount of stock by them held, be jointly and severally liable for all debts or responsibilities of the company." Adjudications of many courts had declared by what sort of legislation a general personal liability, which would follow the person of the stockholder into any jurisdiction, might be created. The state constitution suggested the way in which it might be done; the New York statute, and the national banking law, and its own insurance corporation law, afforded precedents ready to hand. The way was open and clear. Nothing was easier and simpler than to declare such general personal liability, if that was the purpose of the legislature.

But it is evident that the Kansas legislature had no such thought. Perhaps it did not so much as consider the likelihood of there being non-resident stockholders of Kansas corporations, to be made amenable elsewhere. What it did was to establish certain remedies, unknown to the common law, to be enforced by the courts within its jurisdiction. We repeat, there is not one particle of evidence of any intention to go beyond this.

If, on the other hand, notwithstanding these considerations, the provisions in question are to be construed as having force beyond the boundaries of Kansas, then we have presented the case of the

Kansas legislature imposing remedies of its own creation upon the courts of other states.

By what authority can the Kansas legislature prescribe a new remedy to be administered in the courts of the state of New York, or in the courts of the United States within the state of New York?

The state of New York, by its own statutes, has prescribed the remedies to be employed in its courts. Among these remedies we do not find an action to charge a stockholder with a judgment, either domestic or foreign, against his corporation. Nor was such an action known to the common law.

The remedies available in the Circuit Court of the United States for the Southern District of New York were formerly those known to the common law in the State of New York in the year 1792, and such further remedies as congress had from time to time created by express enactments. By section 914 of the Revised Statutes of the United States it is provided: "The practice, pleadings and forms and modes of proceeding in civil causes other than equity or admiralty causes in the circuit and district courts shall conform as near as may be to the practice, pleadings and forms and modes of procedure existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." We find no authority in these sources for an action by the plaintiff in an execution against a corporation to charge a stockholder with the amount of his judgment against a corporation.

Suppose the Kansas legislature had said in so many words: "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, *and such actions may be maintained in the courts of Kansas and in the courts of any other State and in the courts of the United States.*" Will it be claimed that such an enactment would have conferred jurisdiction to entertain such actions upon any of the courts named, except the courts in Kansas? Is it not clear that such an attempt to transcend its powers would have been wholly nugatory?

It will be observed that the question is not one giving full faith and credit to the Kansas judgment. That question would be presented if the action here were brought against the corporation, upon the Kansas judgment. It does not arise in an action here against the stockholder.

In this action, brought here against the stockholder, the question presented is whether the Kansas legislature can confer upon a Kansas judgment against the corporation, a new and unusual force and efficacy outside the state of Kansas, making it in legal effect *everywhere* a judgment against the stockholder, and authorizing an action to be brought upon it *anywhere* to charge the stockholder with it.

In *Marshall v. Sherman*, 148 N. Y. 9, an action brought under this very Kansas statute, the court says: "The question is thus presented whether a right of action unknown to the common law, and existing only by force of the statutes of another state can be enforced in the courts of this state, or outside of the local jurisdiction where the corporation is domiciled. * * * We think that when the statutes set forth in the complaint are carefully read, it is apparent from their language that they provide for a *special and peculiar remedy* against the stockholders of a corporation created under the laws of that state."

In *Story on Conflict of Laws*, § 572, it is said: "Wherever a remedy is sought, it is to be administered according to the *lex loci;* and such a judgment is to be given as the laws of the state where the suit is brought authorize and allow, and not such a judgment as the laws of other states authorize or require."

Similarly, in 2 *Kent's Commentaries*, 462: "Remedies upon contracts and their incidents are regulated and pursued according to the law of the place where the action is instituted, and the *lex loci* has no application."

And, again, in *Wharton on Conflict of Laws*, § 721: "When a party seeks to avail himself at home of the law of a foreign state, as determining the legal relations of a case arising in that state, he must do so through the process of the *lex fori;* and if no process of such forum is available for such purpose, then his remedy fails." And at § 749: "Nor will a court, in order to give effect to a foreign law, introduce into its own system a foreign remedy alien to its procedure. If none of the established machinery of the court whose aid is sought is capable of applying such foreign law, then the plaintiff is without remedy."

It is quite possible that some confusion of ideas has existed regarding the effect upon a stockholder of a judgment against his corporation.

In one sense, a valid judgment against a corporation is binding

and conclusive upon the stockholder. It is binding and conclusive upon him, *as* stockholder, that is, as regards his rights and interest in the corporation represented by his holdings of stock. To that extent he is a part of the corporation and the corporate acts are his acts. It would be as illogical as it would be impracticable to permit the stockholder in the interest of his stock to renew controversies which had been already determined in suits by and against the corporation itself as his lawful representative. Such determinations must be final in regard to the interests represented by his stock.

But it is quite otherwise in regard to the individual liability of the stockholder. That rests on an entirely different ground. That is enforceable, not against the money which by investing, in the stock, he has committed to the corporate enterprise, but against his other property generally. And while such liability comes to him because he is a stockholder, it is imposed upon him in his individual and personal capacity.

And thus it is that while, as regards his stock, and the share in the corporation which his stock represents, the judgment against the corporation is binding and conclusive upon him, the same is by no means true as regards his individual personal liability. As to *that* the corporation does not represent him. *That* liability is not a corporate asset. So far as *that* liability is concerned he is a distinct person from the corporation. A judgment against the corporation is, as to him, *res inter alios*. He is neither party nor privy to it; and, it is not even evidence against him, except in jurisdictions where it may be given the force of such evidence by express statute.

This being so, it is apparent that while the Kansas statute may make the Kansas judgment against the corporation evidence, and conclusive evidence, againt the stockholder, in respect of his individual liability, in the Kansas courts, it cannot have that effect in the courts, whether state or federal, within the state of New York. The laws of Kansas cannot make new rules of evidence for those courts.

It has been expressly and repeatedly held in New York that a judgment against the corporation is not even evidence against the stockholder.

Thus in *Moss v. McCullough*, 5 Hill, 131, Judge BRONSON said: "I think the judgment is neither conclusive nor *prima facie* evidence against the stockholder of the original debt or demand against the company."

And in *Miller v. White*, 50 N. Y. 137, cited with approval in *Chase v. Curtis*, 113 U. S. 452, it was said by Judge PECKHAM: "If a stockholder be a surety, the judgment against the principal does not bind him. * * * If he be a principal debtor with the company, each severally liable, then a judgment against one party severally liable has no force against another who is also severally liable."

How, then, can the liability of the stockholder, created and declared only by this *remedy* for enforcing against the stockholder the Kansas *judgment against the corporation*—and *not* the original debt—be enforced in state or federal courts within the state of New York?

POINT FOURTH. The decisions relied upon to support the judgment rest upon insufficient authority.

The whole fabric of supposed authority has been built up upon a mere *dictum* of the Kansas Supreme Court in *Howell v. Manglesdorf*, 33 Kan. 194.

In that case it was sought to enforce the *first* of the two remedies provided in section 32, an execution against the stockholder upon a judgment against the corporation. The *second* of the two remedies was neither resorted to, nor in any way involved. The notice of the motion for an order that the execution issue, required to be given by the terms of section 32, was served upon the stockholder without the state of Kansas, and the stockholder objected to the jurisdiction of the court on that ground.

The objection was sustained. The court held that it could not acquire jurisdiction by service of the notice outside the state of Kansas, and therefore had not acquired jurisdiction over the stockholder in the case before it.

Being thus without jurisdiction, the Kansas court could decide nothing further. It could decide no question against the stockholder who had not been brought before it; and *a fortiori* it could decide no question against other stockholders of other corporations who might at some future time be prosecuted on the ground of individual liability. Having decided itself to be without jurisdiction, it was clearly incompetent for it to decide any other question whatever.

But, disregarding this plain and absolute limitation, the court, perhaps wishing to console the "plaintiff in the execution" for his disappointment in the denial of the motion, perhaps to assert the all-prevailing force of the Kansas statutes, went on to express its views on a question which was in no wise presented by the case before it, and which it could not have authoritatively passed upon if it had been so presented; viz., the jurisdiction of the courts of other states to entertain actions under this section 32 of the Kansas statute. It says:

"This rule does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another state and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder."

It is conceivable that a case might arise in which it would be necessary for the Kansas court to decide whether a New York court *had had* jurisdiction of matters claimed to have been judicially before the New York court. It is inconceivable that a case could arise in which the Kansas court could decide authoritatively in advance whether a New York court *would have* jurisdiction to entertain an action under a foreign statute, or to enforce a liability created by a foreign statute, or to enforce a remedy created by a foreign statute.

But even if the question might have come before the Kansas court, it is clear that it *did not*, and the language of the court is nothing more than a *dictum*.

It is well settled that such a *dictum* is not to be regarded as an authority.

In *Carroll v. Carroll*, 16 How., 286, it was said by Mr. Justice CURTIS: "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then according to the principles of the common law an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And, therefore,

this court, and other courts organized under the common law, has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens vs. The State of Va.*, 6 Wheat., 399, this court was much pressed with some portion of its opinion in the case of *Marbury vs. Madison*. And Mr. Chief-Justice MARSHALL said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent, other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *Ex parte Christy*, 3 How., 292, and *Jenness et al. vs. Peck*, 7 How., 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

This language of the Kansas court, then, is not, as has been sometimes erroneously said, a *decision* of that court, interpreting the laws of Kansas, and therefore binding and controlling upon the question when it shall be raised in other courts. It is merely an expression of opinion which is entitled to consideration solely for its intrinsic weight and force, and not at all because it happens to have been uttered by a Kansas court.

Weighed in this balance it will be found wanting. It does not reason. It simply asserts that the action "may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder." And the only authority for this assertion is the citation of *Flash v. Conn*, 109 U. S., 371, *Dennick v. R. R. Co.*, 103 U. S., 11, *McDonough v. Phelps*, 15 How. Pr., 372, and *Seymour v. Sturges*, 26 N. Y., 134.

The assertion, then, is entitled to just so much weight as these authorities give it and no more. They give it no weight whatever.

Flash v. Conn was an action under the New York statute which expressly declared that the stockholders were severally individually liable, and prescribed no particular remedy. This throws no light

upon the construction of the Kansas statute which declares no liability, but simply provides the novel remedy of an action against the stockholder to charge him with a Kansas judgment against the corporation.

Denning v. Railroad Co. was an action to recover damages for a personal injury. It held only that actions of that particular class were transitory. "The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial."

McDonough v. Phelps was an action brought in New York by creditors of a Connecticut corporation to recover of stockholders the amount of their unpaid *subscriptions* and was decided in favor of defendants.

Seymour v. Sturges was an action brought in New York by a creditor of a Maryland corporation to recover from a stockholder his unpaid *subscription*, and the stockholder was held not to be liable.

Thus it is seen that not one of the decisions supports the *dictum* in *Howell v. Manglesdorf*, which is left a naked assertion, unsupported by either reason or authority.

And yet, upon the supposed authority of this language in *Howell v. Manglesdorf*, and upon this alone, rest all the decisions which are relied upon to support the present judgment. A brief examination of those decisions will confirm this.

Bank of North America v. Rindge, 57 Fed. 279. This was an action at law brought in California by a creditor of a Kansas corporation to enforce the liability of a stockholder under section 32 of the Kansas statute. The case came up on demurrer to the complaint, and presented but two questions: first, whether the plaintiff's remedy was at law or in equity, and, second, when the statute of limitations began to run. The court quoted the language of the Kansas court in *Howell v. Manglesdorf* and then said: "The construction of the Kansas statute by the highest court of that state is *binding on this court*. That is the general rule in respect to the construction of state statutes and constitutions * * * The Kansas statute upon which the suit is based, *as construed by the Supreme Court of that State*, provides two remedies for enforcing the individual liability of stockholders, one of which is by an ordinary action at law, to be instituted wherever personal jurisdiction of them can be acquired."

Rhodes v. United States National Bank, 66 Fed. 512. This action was brought in Illinois by a creditor of a Kansas corporation against a stockholder to enforce his liability under section 32 of the Kansas statute for a Kansas judgment against the corporation. The court quotes the language of *Howell v. Manglesdorf*, and says: "As this is a question of the proper construction to be given to a constitutional and statutory provisions of a state, the *decisions* of the highest court of that state are *binding upon this court.* * * * A case similar to the one at bar arose and was heard on demurrer by the United States Circuit Court for the Northern District of California in 1893, under the same provisions of the Kansas statute and constitution, and the same ruling was made, the court *following the decisions* of the Supreme Court of Kansas. *Bank of North America v. Rindge*, 57 Fed. 279."

McVickar v. Jones, 70 Fed. 754, was an action at law, brought in New Hampshire, against a stockholder of a Kansas corporation, upon a Kansas judgment against the corporation. The case came up on demurrer to the declaration. The court sustained the cause of action as one which the court was *bound* to recognize and enforce, on the strength of the "*decisions*" of the courts of Kansas and of the United States, citing *Howell v. Manglesdorf*, *Bank of North America v. Rindge*, and *Rhodes v. United States National Bank*.

Mechanics' Savings Bank v. Fidelity Ins. Trust & S. D. Co. 87 Fed. 113, was a motion for a new trial, and, as was said in the opinion by DALLAS, J., the principal question was, under section 32 of the Kansas statute, "Does an action at law by a single judgment creditor lie against a single stockholder by virtue of these provisions?" After referring to the character of the liability considered in *Flash v. Conn* and similar cases, the court goes on to say: "Unfortunately the meaning of the provisions with which this court is now required to deal is not so clearly obvious. The Kansas constitution does not define the liability which it imposes, nor direct how that liability shall be enforced. It seems to have been contemplated that this omission would be met by legislation, and, accordingly, there was enacted the statutory provision which is copied at the head of this opinion. * * * The remedy provided is twofold and alternative. * * * The proceeding by action, it has been held, may be brought by a single creditor and is transitory. This appears to have been *settled* by the *decisions* of the Supreme Court of Kansas. It is objected that upon these points these decisions

were *obiter dicta*, and not authoritative ; but they appear to have received full consideration by the Kansas court, and its opinion is at least entitled to great weight, *Bank v. Whitman*. 76 Fed. 697 [present case]. If, however, I entertained a doubt as to the propriety of following that court, I would feel *constrained* to do so, because its views have been acquiesced in and adopted by several of the federal courts." To this are cited our old friends, *Howell v. Manglesdorf*, *Bank v. Rindge*, *Rhodes v. Bank*, *Mc Vickar v. Jones*, *and* the present case ; a chain of authorities, each link of which hangs only upon those before it, and the first link, *Howell v. Manglesdorf*, hangs upon nothing.

Thus we find that *Bank of North America v. Rindge* was decided as it was because the court considered itself *bound* by the "*decision*" in *Howell v. Manglesdorf*. Manifestly an opinion of this kind adds nothing to the authority of the first decision. And it is the same with all the rest.

Rhodes v. U. S. Nat. Bank was decided upon the authority of *Howell v. Manglesdorf* and *Bank of North America vs. Rindge*, the court, as before, stating that it was "*bound*" by the "*decision*" in the first case. No added authority here.

Mc Vickar v. Jones is based upon *Howell v. Manglesdorf*; *Bank of North America v. Rindge* and *Rhodes v. U. S. Nat. Bank* the Court again expressing itself as "*bound*" by the first case. No added authority therefore.

Mechanics' Savings Bank v. Fidelity Ins. Co. rests upon *Howell v. Manglesdorf*, *Bank of North America v. Rindge*, *Rhodes v. U. S. Nat. Bank* and *Mc Vickar v. Jones*, the court again considering itself "*bound*" by the first "*decision*", and is therefore no added authority.

In neither of these cases do the courts give any reasons to support their conclusions, but each one of them is based solely upon the proposition, "The Supreme Court of Kansas has so decided and we *cannot* question that decision."

As it now appears that the Supreme Court of Kansas has never so decided, all this apparent weight of authority must fall with the case from which it is derived.

The stream cannot rise higher than its source.

Ex nihilo nihil fit.

The decision in *Hancock Bank v. Ellis*, 166 Mass. 414, does not help the defendant in error here. It was rendered on demurrer to

a declaration which set forth the pleader's construction of Kansas law, as matter of fact. As a demurrer admits the facts averred in the pleading demurred to, it necessarily admitted that the Kansas law was as stated in the declaration. The decision means no more than if the declaration truly stated the law of Kansas, an action might be maintained in Massachusetts. And as the declaration averred that law to be that a stockholder of a Kansas corporation is liable to a judgment creditor of the corporation as upon contract, suable anywhere, the court did not experience much difficulty in overruling the demurrer. The decision makes no attempt to determine what the Kansas law really is. As is said of it in *Hancock Nat Bank v. Ellis, infra*, "The court said that the declaration stated a case; thus achieving, in the apt words of the defendant's counsel in this case "a temporary triumph of mendacious pleading."

The other cases cited, as *Auer v. Lambard*, 72 Fed. 209, and *Huntington v. Attrill*, 146 U. S. 657, throw no light upon the question presented here by the peculiar character and special remedies of the Kansas statute. They arose under statutes expressly declaring a liability, as in *Flash v. Conn*, and have no bearing on the question whether the special statutory remedy created by section 32 of the Kansas statute is in force beyond the limits of Kansas.

POINT FIFTH. The authorities against the support of this judgment have the greater weight, because they are founded in reason and upon established principles.

The fundamental principles and the radical distinction which has already been noted, are fully discussed and clearly brought out in the leading case of *Lowry v. Inman*, 46 N. Y. 119.

"In many charters," says the court, "the intent is obvious to impose an absolute liability on the stockholders. In all such cases the liability is personal, and following the person may be enforced as other personal obligations are enforced, and according to the course of procedure in the place where the individual sought to be charged is found. It is not in such case a statutory *remedy*, or a liability based upon a statute, and which is *confined* in its operation to the limits of the sovereignty creating the corporation, and without extra-territorial force or obligation. It is like other obligations,

assumed in the form prescribed by the laws of the place where made, and, being valid there, is enforceable everywhere. Its validity, interpretation and effect are to be determined by the *lex loci;* but the *remedy* is governed by the *lex fori.* If, therefore, the act of the legislature of Georgia, incorporating the Northwestern Bank of Georgia, had declared, in terms, that each stockholder should be individually liable for the redemption of the bills and payment of the debts of the bank, or that the stockholders generally, or jointly and severally, or otherwise, should be so liable, there would be no doubt, upon principle, or the decisions of our own courts, that the courts of this state would be open to a creditor of the bank, to enforce the liability of a stockholder for the payment of such debt, according to the terms of the charter." But if the intent was to charge the property of the stockholder by a peculiar and unusual procedure, " prescribing the remedy going with it and as a part of the right, a general personal liability will not attach to the stockholder. * * * The right of creditors of the corporation, against the corporators, rests upon the statute, and the assent of the stockholders to its terms and conditions, and the same statute gives the remedy, and within well settled rules the party is confined to the remedy given. Whether the obligation is imposed, and the remedy given solely by the statute, or rests upon the assent of the stockholders to the terms and conditions of the act, the result is the same; the obligation, or liability, and the remedy, are *inseparable;* and the party interested is confined to the remedy prescribed by the act, and assented to by the stockholder." "The remedy is necessarily confined to the sovereignty of Georgia, and can have no recognition or effect beyond the boundary of that state. The charter creates no right and imposes no obligation disconnected with the prescribed remedy, which is local in its character, and not capable of being enforced without the state of Georgia. A foreign tribunal cannot enforce it."

The same rule was declared by this court in *Pollard v. Bailey,* 20 Wall. 520, where it is said: " The individual liability of stockholders in a corporation is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement." " The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A *general liability* created by statute *without a remedy* may be enforced by an appropriate common law action. But

where the provision for the liability is coupled with a provision for a *special remedy*, that remedy, and that alone, *must be employed*."

Huntington v. Attrill, 146 U. S. 657, in no wise departs from this rule. On the contrary, it, in effect, confirms it. For it holds that the statute of New York, declaring that in case of a false report by the officers of a corporation "all of the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," created a general liability, equally with the provisions declaring the individual liability of stockholders in certain cases; and that the judgment which had been recovered against the officer in New York upon that liability could be enforced by bill in equity to reach defendant's property in another state; and that such bill was not open to the defence that the original judgment was for a penalty "in the international sense."

This same Kansas statute was before the New York Court of Appeals in *Marshall v. Sherman*, 148 N. Y. 9. That was an action in form like the present one, the complaint reciting the constitution of Kansas and the same sections of the Kansas statutes, recovery by the plaintiff of a judgment in the courts of Kansas against a Kansas corporation in which the defendant was a stockholder, and the return of an unsatisfied execution thereon. Judgment was demanded against the stockholder for the amount due on the Kansas judgment against the corporation.

In its opinion the court says: "We think it quite clear that the provision of the constitution referred to is not self executing, and of itself creates no liability whatever. The language used plainly contemplates that legislation was necessary in order to make it effectual. * * * The legislature did enact such statutes, and it is these enactments and not the constitution itself which is sought to to be enforced in this action. The question is thus presented whether a right of action unknown to the common law and existing only by force of the statutes of another state, can be enforced in the courts of this state, or outside of the local jurisdiction where the corporation is domiciled. * * * We think that when the statutes set forth in the complaint are carefully read, it is apparent from their language that they provide for a *special and peculiar remedy* against the stockholders of a corporation created under the laws of that state. From their whole structure and scope it is apparent that they were *intended to operate* and be enforced only within that

jurisdiction. It is quite clear that as to some of their provisions, at least, it would be impossible to enforce them in this state, and they should be construed as enactments *in pari materia*, and as a whole. * * * The relations of the defendant as a stockholder of the corporation are fixed and governed by the laws of the state in which the corporation is domiciled and under which it was created. If those laws created a liability against the defendant upon certain conditions and under certain circumstances, they also provided a *special and peculiar remedy*." It was unanimously held that the action could not be maintained in the courts of New York.

Bank of North America v. Rindge, 154 Mass. 203, presented the same question. The declaration alleged that the plaintiff had recovered judgment in Kansas, against a Kansas corporation; that execution had been issued thereon and returned unsatisfied; that defendant was a stockholder in the corporation; and that the action was brought to charge him personally with the judgment, by virtue of the provisions of the laws of Kansas. The defendant demurred and the demurrer was sustained. The court says: "The question can hardly be considered as an open one in this commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other states under statutes of these states." This is put upon the ground that "complete justice can only be done in the courts of the jurisdiction where the corporation was created," and the court says: "We remain satisfied with the conclusions heretofore reached by this court that such an action, under the circumstances which appear here, ought not to be entertained in this state."

In *Fowler vs. Lamson*, 146 Ill. 472, after concluding that the Supreme Court of Kansas "has fully recognized and in effect held that stockholders of corporations organized under the constitution and foregoing statutes of that state are individually liable to creditors of such corporation to an additional amount equal to the stock owned by each of them," the opinion goes on, after quoting the terms of the Kansas statute, as providing "two *special* modes * * * by which creditors * * * may enforce the liability of stockholders," to say: "It is well settled that these *special remedies* having been provided for the enforcement of the individual liability of stockholders created by the laws of Kansas, they alone can be pursued to enforce that liability. The reason of this rule is manifest. The liability only exists by force of some constitutional or statutory provision, and the person incurring that liability is presumed

to do so subject to its enforcement by the special provision made for that purpose, and no other. The amended bill in this case proceeds upon the allegation that the corporation has been dissolved, but attempts to enforce the individual liability of the defendants by a proceeding entirely different from that prescribed by the statute of Kansas, and thus deprives the defendants of the speedy and adequate remedy given them by that statute against other stockholders, if they should be liable. There is also the further insuperable objection to this proceeding; that it is an attempt to enforce the individual liability of the defendants in a jurisdiction other than that in which the corporation exists, the rule being that when a special remedy is given creditors of a corporation against its stockholders, the liability cannot be enforced in another state. The reason for this rule is forcibly illustrated by the above-quoted statute of Kansas, providing a remedy in case of the dissolution of a corporation, which remedy, it must be conceded, could only be enforced in the state of Kansas, where presumably the stockholders of the corporation generally reside. For the reasons here given, it is clear that the bill could not be maintained in this state. Judgments have not been maintained in this state or elsewhere against appellees. The proceeding is an attempt to enforce their individual liability as stockholders by compelling *them* to pay judgments against *the corporation*.

Tuttle v. Nat. Bank of Republic, 161 Ill. 497, is still stronger. It holds that the constitutional provision is not self executing, and that no declaratory statute had been enacted. "The legislature of that state, by such legislation as has been enacted, has only attempted to declare the remedy." "In determining the construction of these provisions of the statute of the state of Kansas, and considering the remedies provided, and bearing in mind that there is *neither a constitutional nor statutory liability effectively declared in that state*, we must construe these statutes *with reference to the remedy*, in the light of such rules and upon such principles as the courts of this state apply to the construction of such enactments. The remedy provided by the second clause of the first section quoted, and by the second section [§ 32] of the above quoted legislation, is a remedy unknown to the common law, and it is a remedy existing only by force of the statute of the state of Kansas. * * * A remedy special to a particular foreign state is not, by any principle of comity, enforcible here, and must be applied within the jurisdiction of the domicil of the corporation."

Hancock Nat. Bank v. Farnum, 40 Atlantic 341, was decided by the Supreme Court of Rhode Island in April, 1898. It holds that the constitution of Kansas creates no liability and that the provisions of the Kansas statute were not enforceable in Rhode Island. Discussing the proposition that the Kansas statute creates a contractual liability, the court points out that the question was not involved in *Howell v. Manglesdorf*, and that the utterance in that case was a mere *dictum*, and then goes on to say : " Certainly the ordinary elements of a contract are wanting. The minds of the stockholder and corporation creditor have not met upon the subject matter of the original debt. No credit has been given to the stockholder directly. He has not directly received the consideration, nor has he made a promise, express or implied. There is nothing between them which at common law would be regarded as a contract. But the statute imposes a liability upon grounds of equity and public policy. * * * In *Rice v. Hosiery Co.*, 56 N. H. 114, the court says : 'The liability which the plaintiff seeks to enforce is a mere creature of the statute, having none of the elements of a contract, whether express or implied. It is a naked statutory liability, entirely unknown to the common law, for the indebtedness of the corporation however it may accrue,—whether by the breach of a contract, or the commission of a tort. The stockholder is not liable upon the contract in one case, nor for the tort in the other, but, under the statute, for the debt against the corporation which may grow out of either.' As this view is so clearly founded in reason, and as this court has already decided in *Sales v. Bates*, *supra*, [5 Atlantic 497,] that the liability is not a contract, we do not feel called upon to change that decision, even though the majority of courts may hold the other way. It follows, therefore, that the declaration does not state a contract under the laws of Kansas, as construed by the decisions of the Supreme Court of that state to which we have been referred, nor by our own construction of it."

Thus the weight of considered authority is wholly opposed to the series of decisions which are mere successive echoes of the *dictum* in *Howell v. Manglesdorf*.

It is demonstrated that the liability is not general, is not contractual; but is simply a liability to a special and peculiar remedy not generally available outside the state of Kansas. As was said in *May v. Black*, 45 N. W. Rep., 949, " It is a principle of law which does not appear to be questioned that where a special remedy

against stockholders is prescribed by the statute under which the corporation is formed, it must be enforced in the courts of that state exclusively."

It is also pointed out that the stockholder, sued in another state upon the Kansas judgment, is deprived of his remedies by way of enforcing contribution ; and it is manifestly unjust, and contrary to the spirit of the Kansas statute, that a single stockholder should be compelled to bear the whole burden.

POINT SIXTH. If the liability of a stockholder in the Kansas corporation is upon contract, then the statutes of frauds forbid the enforcement of such contracts.

If the obligation of a stockholder in a Kansas corporation, under this Kansas statute, is a contract on his part to be bound by the obligations or debts of such corporation, whether in form of simple debts or of judgment against the corporation, then the provisions of of the statutes of frauds apply.

In law, excepting so far as concerns the interests of the stockholder as represented by his stock, the stockholder and the corporation are two distinct entities, two distinct persons; and either may contract with the other, and may sue the other or be sued by the other.

If, then, the stockholder contracts to pay the debt of the corporation or the judgment against the corporation, it is simply the case of A contracting to pay the debt of B, or the judgment which may be recovered against B.

The statute of frauds requires any such *contract* to be in writing, signed by the party to be charged thereby. We have nothing of the sort here.

The Kansas statute of frauds,—Gen. Stat. Chap. 112, Sec. 6,—declares that no action shall be brought upon such agreement. The New York statute declares that every special promise to answer for the debt, default or miscarriage of another "shall be void unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged therewith." Rev. Stat. Part 2, Chap. 7, Title 2, Sec. 2 and 3.

In *Moses v. Lawrence Co. Bank*, 149 U. S. 303, it was held that the statute of frauds of the state furnishes the rule of decision of the federal courts within the state. Therefore such a contract must be held void in the Circuit Court of the United States for the Southern District of New York.

It little matters, however, which statute controls. Whether the contract is declared void, or whether an action upon it is prohibited, is of little moment. The result is substantially the same.

How is the defendant here, A, to be—in the language of the Kansas statute—*charged with the judgment* against B, without writing signed by A, to that effect?

Manifestly he is to be so charged, if at all, *not* because he has so contracted, *but because the liability is imposed upon him by the Kansas statute.* In so far as that statute, *proprio vigore*, imposes the liability upon him, he is liable; in so far as it does not impose such liability, he is NOT liable.

And if the Kansas statute, instead of imposing and declaring a liability, simply provides a remedy, he is liable to that remedy only where the inherent force of the Kansas statute can make that remedy available.

POINT SEVENTH. The action cannot be maintained under section 44 of the Kansas statute.

It has been already shown that the action was in fact brought under section 32; that the complaint demanded judgment against the defendant as a stockholder, for the amount of the Kansas judgment and the rate of interest which the Kansas judgment carried; that the verdict was for that precise amount and interest at that rate, and that the judgment which is now and here under review, followed the verdict, and was sustained by the Circuit Court of Appeals as a judgment founded on that section.

Clearly then, whatever other judgment *might* have been rendered, the judgment actually rendered is a judgment under section 32.

Under §481 of the New York Code, "The complaint *must* contain: * * * 3. A demand of the judgment to which the plaintiff supposes himself entitled."

The judgment demanded here is a judgment under Kansas sec-

tion 32. This characterizes the action as being brought under the provisions of that section. The complaint only assumes to state one cause of action. Obviously, the plaintiff could not seek to recover in one action on the two distinct grounds of sections 32 and 44; on the judgment against the corporation for the amount of that judgment and interest, and on the original debt for the amount of that debt and interest. If the complaint were ambiguous, the demand of judgment would declare that plaintiff elected to sue under section 32.

"Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them, being once made, the right to follow the other is forever gone." —*Rodermund v. Clark*, 46 N. Y. 354.

The proceedings against stockholders under these two sections are separate and distinct in character.

This is clearly put by the Supreme Court of Kansas in *Cottrell vs. Manlove*, 49 Pacific, 519: "Two remedies against stockholders of a corporation are afforded by the statute to its creditors. They are contained in Sections 32 and 44 of the chapter on Corporations." After quoting these sections in full, the court goes on to say: "The remedies afforded by these two sections cannot be called 'cumulative,' and considered equally open to creditors. One relates to the exigency of corporate insolvency; the other to that of corporate dissolution. Under one the proceeding lies because the corporation is bankrupt, though not necessarily dissolved; under the other, because it is dissolved, though not necessarily bankrupt. * * * The liability of the stockholders being one created by statute, the period of limitation upon the right to enforce it was three years. If it were true that the remedy of judgment against the corporation, and execution thereafter against the stockholders is cumulative, and likewise open to the creditor, the possession of such *additional* remedy could not extend the period of limitation. * * * An *election* between *mere forms of statutory procedure* does not give a right to extend the statutory period of limitation for the commencement of such procedure."

Again; the remedy afforded by section 44 is only available in Kansas.

The remedy of section 44 is that "suit may be brought against any person or persons who were stockholders at the time of such

dissolution, without joining the corporation to such suit; *and* if judgment be rendered and execution satisfied, the defendant or defendants *may sue all who were stockholders at the time of dissolution* for the recovery of the portion of such debt for which they were liable and *the execution* upon the judgment *shall direct* the collection to be made from property of each stockholder respectively," etc.

It will be observed that this remedy is only available upon the dissolution of the corporation, which dissolution for the purposes of such an action may be sufficiently shown by showing that the corporation has suspended business for more than one year. As we have already seen, this is a distinct proceeding from that contemplated in section 32, which may be brought at any time, and which must begin with an action and judgment against the corporation alone, as the foundation of any relief against the stockholder.

As the remedy of section 44 is designed as a remedy to be employed after dissolution, so likewise that remedy is coupled with an express provision for equalizing the burden of the corporate debt amongst all solvent stockholders. The defendant, from whom a creditor of the corporation in such case may have collected his debt, may sue all who were stockholders at the time of dissolution for their proper proportion of the amount which he has been compelled to pay, and if any of his fellow stockholders are not able to pay their shares, then the amount of the deficiency is to be divided equally among the remaining stockholders, " and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved".

If, then, the liability of the stockholder under this section is contractual in its character, we must take the whole contract together. The contract is not that the stockholder will independently pay any debts against the corporation after dissolution; but that he will pay with a right to enforce contribution amongst his solvent fellow stockholders. If, under this section, he is held to the terms of a contract so far as those terms are to his disadvantage, he is entitled to be so held only on condition that he shall receive the benefit of so much of the terms of the contract as are designed for his benefit and protection.

Thus it is clear that the proceeding provided by section 44 is an entirety, and also that it is a special proceeding provided for the

case of dissolution only, and that it is not available without the limits of the state of Kansas.

Accordingly it has been held of this and similar remedies, that the courts of other states would not entertain them, because it would be inequitable to endeavor to enforce them elsewhere than in the jurisdiction where the corporation is domiciled, and where alone full and complete justice could be done amongst all parties. And it is so held in reference to this very statute in *Marshall v. Sherman*, *Bank of North America v. Kindge* and *Fowler v. Lamson*, already cited.

And thus it was held by the Circuit Court for the District of Massachusetts, in *State National Bank v. Sayward*, 86 Fed. 45, that "a bill in equity cannot be maintained by a creditor to enforce the liability of a stockholder in a corporation organized under the laws of another state," citing *Pool v. Railroad Co.* 144 Mass. 341, "If an assessment is to be laid upon the members or stockholders, or a contribution enforced from them, according to the law of the state under which the corporation is created, the courts of that state alone can afford complete and effectual judicial relief."

POINT EIGHTH. There are serious objections to the assumption by courts of the United States of jurisdiction to enforce this remedy.

Waiving, for the moment, the question of power, it is purposed to point out some of the reasons why, if the power exists, it should not be exercised.

Consider, first, the nature of the liability.

The stockholder is subjected to an action to compel him to pay a judgment against his corporation. In that action the judgment is conclusive, unless he can impeach it for fraud or want of jurisdiction. This is distinctly held in *Ball v. Reese*, 58 Kan. 614, and is recognized by Judge COXE in *Am. Freehold L. M. Co. v. Woodworth*, 82 Fed. 269.

Thus the stockholder is made liable, not for the *debts* of the corporation, but for the *judgments* which may be recovered against it. No matter what defences the corporation might have raised, and prevailed in, unless it failed to do so in fraudulent collusion with

the plaintiff he is conclusively bound. The failure to defend may have been due only to inattention or incompetency on the part of the managing officers, or to want of money to secure a proper defence. There may be some show of reason why a stockholder residing in Kansas should be thus bound. It may be said that he should look after the affairs of the company and watch to see that they were properly administered. But it is a very harsh rule, even as to him, for a stockholder cannot ordinarily meddle in the affairs of his company, or keep himself informed as to what is going on. And it is manifestly impossible that a stockholder residing in New York could keep himself so informed in regard to the business transacted in Kansas.

This being the rule, it follows, as has already been shown, that the right of action does not accrue against the stockholder until judgment has been recovered against the corporation; and it is only when the right of action accrues against the stockholder that the statute of limitations begins to run in his favor. Consequently, if the statute of limitations might have been evoked in favor of the corporation, but was not, the stockholder is helpless; and in this way his liability may be indefinitely prolonged.

In this present case Huey, assuming to appear for the company in the Kansas action, put in a defence, and then defaulted upon the trial. What might have come of that defence, or what other defences might have been successfully maintained will now never be known. The judgment stands conclusive unless we can *prove* Huey's collusion.

It is worthy of mention, also, that while the statute of limitations of Kansas runs in three years to protect the stockholder there from an action on this judgment, the statute of limitations of New York, where Whitman was sued, does not run until six years. So that, if the New York statute prevails, as held by Judge LACOMBE in *Schiffer v. Trustees of Columbia College*, 87 Fed. 166, the New York stockholder is liable for three years after the Kansas stockholder has ceased to be liable. If the New York stockholder is compelled to pay the judgment by an action brought after the Kansas stockholder has acquired the protection of the statute, his chances of subsequently enforcing contribution from the Kansas stockholder are evidently very remote.

In the next place, it is certainly in the highest degree undesirable that the federal courts should be in direct conflict with the highest courts of the states where such federal courts sit.

We have seen that the highest courts of Massachusetts, Rhode Island, New York, and Illinois have held that the remedy under this Kansas statute is not available in those states. The highest court of Missouri has held that the remedy was available there, not as matter of right, but *by comity only*, which is explained by the fact that Missouri has identically the same statute, the Kansas statute having been copied from that of Missouri.

Now, what does comity require of the courts of the United States? Do they owe it to the *dictum* of the Kansas court as to the force and effect of a Kansas statute in other states? Or do they owe it to the highest courts of the states where they severally sit and with whose practice their own is designed to conform?

It is for the highest courts of the respective states to say how far the provisions of the Kansas statute shall have effect in the courts of each state. The decision of such a question necessarily belongs to them; it cannot appertain to the courts of Kansas.

It may well be that on some broad question of general law, the federal courts might have and maintain a general and consistent policy which would necessarily be more or less at variance with the varying policies of the several states.

But no such consideration is apparent here. The state of Kansas has passed a statute for its own citizens. In other states each decides according to its own traditions and policy whether the provisions of the Kansas statute shall be given effect within it, that is, whether it is in harmony with the policy of the state that the foreign statute should be accorded effect within it.

What concern of national policy or of general law is involved in the question whether this Kansas statute shall be given effect in New York or Massachusetts or Rhode Island or Illinois? The federal courts do not exist for the enforcement of state statutes beyond the limits where such statutes have force *proprio vigore*. Was it ever contemplated in our scheme of government that Kansas should pass statutes to be enforced by the federal courts in the state of New York, after the courts of New York had held they were not enforcible there? Congress alone possesses the power to pass such statutes. It has not as yet been delegated to Kansas or to any other state.

Thirdly, the practical consequences of such assumption of jurisdiction, in opposition to the action of the state courts in refusing and denying it, will be not only confusion, but a denial of equal justice to all.

A stockholder of this Kansas corporation, sued in the state court in New York, Massachusetts, Rhode Island or Illinois, comes off victorious; but sued in the federal court he is defeated. His rights and obligations, which ought to be fixed and established on known principles, are thus made to depend upon the court in which the action happens to be brought. Naturally, under such circumstances, the plaintiff will always seek the federal court; but whether he can enter his suit there depends again upon the accident of diversity of citizenship between himself and the defendant. If he is a citizen of New York he cannot expect to recover against a stockholder who is also a citizen of New York, because he must bring his action in the state court where he is sure to be beaten. But if he can find a stockholder in Massachusetts he can go there, and sue him, and recover, because in Massachusetts he can sue in the federal court and recover.

If however, the judgment creditor of the Kansas corporation is fortunate enough to be a citizen of Massachusetts, and to find a stockholder who is a citizen of New York, then, although neither New York courts nor Massachusetts courts would entertain his action, he is nevertheless sure of his game, because diversity of citizenship offers him the choice between state and federal courts, and he has only to choose the latter, to succeed, while he would as surely fail in the former.

Let us suppose two judgment creditors of the Kansas corporation, one being a citizen of New York and the other a citizen of Massachusetts. Let us also suppose two stockholders of the Kansas corporation, both citizens of New York. Now, let us work out the results.

The New York creditor sues one of the New York stockholders in a New York court and is defeated. The Massachusetts creditor sues the other New York stockholder in the federal court, and prevails. Both stockholders have been exposed to the same peril. One has been mulcted and the other has gone free. One judgment creditor has got his money; the other has not.

Manifestly there is no contribution of gains among the judgment creditors. It certainly is not apparent how any contribution of losses could be worked out between these stockholders; for the New York stockholder who had been compelled to pay would have to follow his fellow stockholder into the state court, which had already declared the fellow stockholder not liable.

But if the fellow stockholder who had gone free in New York

should be inconsiderate enough to trust himself for a day in Massachusetts, and should be caught there by the Massachusetts creditor, still another complication would reveal itself. Would the New York stockholder be liable in Massachusetts because he was in the federal court there, which maintained liability under the Kansas statute, or would he have a good defence under the plea of *res adjudicata*, because the New York court which did not maintain such liability had already given judgment upon the same question in his favor?

To such absurd and grotesque results we are brought, in following to its legitimate and necessary conclusions the doctrine that the federal courts are to give extra-territorial force to this Kansas statute, regardless of the position taken by the courts of the respective states in which the federal courts sit; results which must operate to fatally discredit the administration of justice, and to bring the courts of the United States into contempt, and expose them to the distrust, if not to the hatred, of the people.

POINT NINTH. The judgment should be reversed with costs.

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